



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

15790

Central

B-40342

December 17, 1980

The Honorable Walter F. Mondale
President of the Senate

Dear Mr. President:

~~Do not forward to public reading~~

[Proposed Amendment to]

The purpose of this letter is to recommend an amendment to the payment provisions of the recently enacted Equal Access to Justice Act, Public Law 96-481, Title II. As enacted, the law contains provisions which are likely to cause potentially serious administrative problems and which could very well frustrate the congressional intent.

Briefly, the Equal Access to Justice Act authorizes the awarding of attorney's fees and other expenses against the United States in certain administrative and judicial actions where they were not previously authorized. The objectives of this legislation are: (1) to permit the awarding of these fees and expenses to reduce the financial deterrent on defending against or seeking review of governmental action, and (2) to promote agency accountability for regulatory actions. The Act adds a new 5 U.S.C. § 504 to cover certain agency actions and amends 28 U.S.C. § 2412 to cover judicial proceedings.

Our concern is with the provisions for making payment of the awards. Under S. 265 as originally introduced, payment would have been from the permanent indefinite appropriation for judgments against the United States, 31 U.S.C. § 724a. The Senate Judiciary Committee amended the bill to require payment from agency funds. See S. Rep. No. 96-253, 96th Cong., 1st Sess. 3 (1979). The law as enacted modified this position somewhat to, as stated by Representative Kastenmeier, "prevent the disassembling of an agency based on one lost case." Cong. Rec., October 1, 1980 (daily ed.), H.10223. The new 5 U.S.C. § 504(d)(1) provides:

"Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code."

514002

The new 28 U.S.C. § 2412(d)(4)(A) is virtually identical with respect to judicial proceedings. In addition, section 207 of the Equal Access to Justice Act, added during the House debate on the conference report, provides:

"The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriation Acts."

The effective date of these provisions is October 1, 1981 (Pub. L. No. 96-481, sec. 208).

The language "in the same manner as the payment of final judgments" in the above sections refers to 28 U.S.C. § 2414 and 31 U.S.C. § 724a. [Under these provisions, final district court judgments against the United States are paid, upon certification by the Comptroller General, from a permanent indefinite appropriation (31 U.S.C. § 724a) unless "otherwise provided for," that is, unless there is some other available source of funds. [The purpose of the permanent appropriation was to avoid the need to obtain specific congressional appropriations.]

We have two major concerns with the provisions of Public Law 96-481 set forth above.

(1) The new 5 U.S.C. § 504(d)(1) and 28 U.S.C. § 2412(d)(4)(A) do not establish a standard to determine when awards must be paid from agency funds as opposed to 31 U.S.C. § 724a. The conference report states that payment should "come first from any funds appropriated to any agency" (H.R. Rep. No. 96-1434, pp. 24, 27), but the statutory language still leaves room for argument. As agencies try to reduce their budgets, they will naturally seek to take advantage of the permanent appropriation, and may argue that the statutory language gives the agency an option. While we do not think the legislative history supports an "option" argument, problems are almost certain to arise. We believe a legislative resolution is desirable and our recommendation is designed to accomplish this.]

As Senator Thurmond stated on the Senate floor on September 30, 1980:

"The second purpose of this legislation is to encourage the agency to be as careful as possible in the exercise of its regulatory powers and to be more

responsive to citizen needs. The implicit assumption in the approach taken by this legislation is that affecting the 'pocketbook' of the agency is the most direct way to assure more responsible bureaucratic behavior." Cong. Rec., September 30, 1980 (daily ed.), S.13876.

[To the extent that the awards have no financial impact on the agencies, this purpose will be defeated.]

(2) Our second concern is section 207, quoted above. Under this provision, [the permanent appropriation is neither permanent nor is it an appropriation with respect to Title II awards.] Representative Smith made the effect of section 207 clear during the House debate on the conference report:

"I think it is very clear the way it is worded that it [section 207] is just an authorization for an appropriation. There has to be a specific appropriation, the same procedure we use in almost all laws around here." Cong. Rec., October 1, 1980 (daily ed.), H.10218.

Thus, [someone (not specified in the Act) will have to request annual appropriations and prepare the necessary budget estimates. Under the Act, the Administrative Conference of the United States is to report annually to the Congress on the total amount of fees awarded in administrative actions, and the Administrative Office of the United States Courts is to report on the total fees awarded in court actions. Neither of these agencies will have any way of knowing what proportion of the total was paid from the permanent appropriation.]

Also, [problems may arise if the specific appropriation for any given year is delayed or exhausted. Should this happen, it would be impossible to make any further payments until sufficient appropriations are available.] This could result in the anomalous situation in which a monetary judgment could be paid promptly under 31 U.S.C. § 724a but the associated award of fees and expenses could not be paid pending enactment of a regular or supplemental appropriation.

[Our proposed amendment] designed to cure both of these problems, is set forth below:

"SEC. 1. Section 504(d)(1) of title 5 United States Code, added by section 203(a)(1) of Public Law 96-481, is hereby amended to read as follows:

"Fees and other expenses awarded under this section shall be paid by the agency over which the party prevails from funds available to that agency. If the head of an agency, or his designee for that purpose, certifies that sufficient funds to pay a particular award are not available, or that payment of the award from currently available funds would significantly disrupt the operations of the agency for the fiscal year in which payment is to be made, the award shall be paid from the fund provided by section 1302 of the Act of July 27, 1956, as amended (31 U.S.C. § 724a), subject to reimbursement by the agency from funds which may subsequently become available or by obtaining additional appropriations for that purpose.]

"SEC. 2. Section 2412(d)(4)(A) of title 28, United States Code, added by section 204(a) of Public Law 96-481, is hereby amended to read as follows:

"Fees and other expenses awarded under this subsection shall be paid by the agency over which the party prevails from funds available to that agency. If the head of the agency, or his designee for that purpose, certifies that sufficient funds to pay a particular award are not available, or that payment of the award from currently available funds would significantly disrupt the operations of the agency for the fiscal year in which payment is to be made, the award shall be paid from the fund provided by section 1302 of the Act of July 27, 1956, as amended (31 U.S.C. 724a), subject to reimbursement by the agency from funds which may subsequently become available or by obtaining additional appropriations for that purpose.

"SEC. 3. Section 207 of the Equal Access to Justice Act, Public Law 96-481, Title II, is hereby repealed.

"SEC. 4. Section 208 of the Equal Access to Justice Act, Public Law 96-481, Title II, is hereby redesignated as Section 207."

"SEC. 5. Section 1302 of the Supplemental Appropriation Act of 1956, as amended, 31 U.S.C. § 724a, is further amended by inserting a comma

after 'Title 28' the first time it occurs, and by inserting immediately thereafter the words 'The Equal Access to Justice Act,'."

[Under our proposed amendment, awards would be paid first from agency funds. If the agency head or his designee certifies that funds are not available or that payment would significantly disrupt agency operations, payment will be made under 31 U.S.C. § 724a but the agency will be under an obligation to reimburse the judgment appropriation. In view of the reimbursement requirement, there would be no need to question the agency's certification in any given case, and there is thus no need to further define the standard of "significantly disrupting agency operations.")

[Our proposal would do the following:

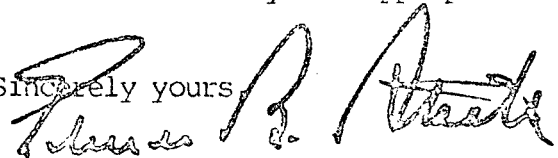
(1) Assure that there will always be a source of funds available to make the payment. This was the theory behind the original enactment of 31 U.S.C. § 724a in 1956--to avoid the need to await congressional action to pay court-ordered awards.

(2) Make it clear that the permanent appropriation is to be used as a "back-up" only in limited situations.]

(3) Provide for agency accountability by virtue of the reimbursement requirement. The reimbursement provision is patterned after a similar requirement in the Contract Disputes Act of 1978, Public Law 95-563, § 13, 92 Stat. 2389.

We believe our proposal is consistent with the intent of the Equal Access to Justice Act and will help in carrying out that intent. We are sending copies of our recommendation to the Chairmen and minority leaders of the Senate and House Judiciary and Appropriations Committees.

Sincerely yours



Comptroller General
of the United States